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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al. as ARKANSAS
PUBLIC SERVICE COMMISSION,
Respondents.

No. 721

37

REPLY

Of Petitioner to Brief in Opposition to Petition for
a Writ of Certiorari.

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REPLY

**Of Petitioner to Brief in Opposition to Petition for
a Writ of Certiorari.**

Comes your petitioner, Lloyd A. Fry Roofing Company, and for reply to the brief in opposition to its petition for writ of certiorari herein filed respectfully shows to the Court:

It is significant that respondents, as did the court below, carefully avoid mention of the fundamental issues in the case at bar. Consideration of these issues is essential not only that this litigation and the rights of petitioner may be properly decided, but also is necessary in that the interstate private motor carrier industry at large may be advised as to the correct interpretation of the Interstate Commerce Act and the extent to which it is subject to regulation by state regulatory bodies under state statutes designed to permit regulation of intrastate commerce.

At the sake of repetition we repeat that the only transportation here involved is interstate transportation, and that the Arkansas Motor Carrier Act, which respondents

seek to enforce, by Section 5 (b) (3) thereof (page 22 of Petition for a Writ of Certiorari) specifically precludes its application to "any private carrier of property," and that the Arkansas Motor Carrier Act contains no definition of "private carrier of property." The Interstate Commerce Act (page 23 of the Petition for a Writ of Certiorari) does contain a definition of "private carrier of property by motor vehicle."

Respondents, in their brief in opposition to the petition for a writ of certiorari, erroneously assume that the basis therefor is an effort to have this Court review findings of fact of the lower court. Such is not the case. The lower court made no findings of fact on essential undisputed facts of record which, if considered at all, would have precluded the result below.

In the first place, the court below made no finding with respect to whether petitioner was or was not a private carrier exercising exclusive direction and control over motor vehicle equipment leased by it and of the drivers thereof; in the next place the court below made no finding as to whether a bona fide employer-employee relationship existed between petitioner and its truck drivers, irrespective of whether they owned the equipment being operated by them; and in the third place the court below made no finding with respect to whether or not the terms and conditions of the equipment lease agreements were or were not scrupulously complied with in actual operations. As petitioner has heretofore pointed out in its petition for a writ of certiorari consideration of the foregoing matters is essential to a determination of whether interstate transportation is private, contract or common carriage within the meaning of the Interstate Commerce Act. A review of the record in this case will conclusively establish that there is no conflict in the evidence with respect to any material fact determinative of the questions above, that the written equipment lease agreements were scrupu-

lously complied with in actual operation, that a bona fide employer-employee relationship existed between petitioner and all of its truck drivers, and that petitioner was in truth and in fact a private carrier transporting its goods in interstate commerce.

We reiterate that if petitioner, engaged solely in interstate commerce, is a private carrier within the meaning of the Interstate Commerce Act, and, as a matter of law, if a bona fide employer-employee relationship exists between it and its truck drivers, then it would be impossible for its truck drivers at one and the same time and in the performance of the same transportation to be contract carriers within the meaning of the Arkansas Motor Carrier Act.

Attention is directed, as well, to the fact that the brief in opposition to the petition, as did the court below, wholly ignores the uncontradicted evidence of record that petitioner had and at all times exercised complete direction and control over the use and operation of leased equipment and assumed full responsibility therefor, irrespective of ownership thereof.

And, while the court below comes up with the conclusion that as a matter of law petitioner's drivers are contract carriers within the meaning of the Arkansas Motor Carrier Act, it is particularly significant that there is no factual finding by the court on any element held by the Interstate Commerce Commission to be essential for motor carrier transportation to be interstate contract carriage. For example, the Interstate Commerce Commission has held that interstate contract carriage entails the execution of a mutual contract between carrier and shipper for a definite period of time, for the transportation of specific commodities in a definitely described territory or between specified points, at specified, filed and published minimum rates and charges; such contracts and tariffs containing minimum rates and charges must be approved

by the Interstate Commerce Commission, and in such contracts the rights, duties and obligations of both carrier and shipper must be well defined, the shipper be obligated to furnish some definite or easily ascertainable minimum amount of freight during the term of the contract, or for a given period, and the carrier bound to transport the freight agreed to be shipped for the consideration specified in the contract. See **Contracts of Contract Carriers**, 1 M. C. C. 628; **Filing of Contracts by Contract Carriers**, 2 M. C. C. 55; **Western Transport Company, Contract Carrier Application**, 2 M. C. C. 107. The opinion of the court below does not allude to the existence or nonexistence of any of the foregoing elements, and it is undisputed of record that the only agreement between petitioner and its truck drivers was an oral agreement of indeterminate duration under which the drivers were simply employed to drive trucks at the will of petitioner for a specified union rate per mile (R., pp. 57, 62-63).

It is respectfully presented that the reference in respondent's brief in opposition to petition for a writ of certiorari to a letter of a field representative of the Interstate Commerce Commission (R. 162) is misleading; in the first place, such representative was not expressing an opinion with respect to existing contracts (R. 167); in the next place the Interstate Commerce Commission indicated its disagreement with its field representative's views by failing to take the action recommended by him (R. pp. 171-72).

Petitioner has no quarrel with the principle that, within permissible limits, states may impose regulations on interstate commerce where such do not unduly burden, hinder or destroy such commerce, but the cases cited in respondents' brief are not in point in this proceeding.¹ It must be

¹ Petitioner, in its petition for a writ of certiorari (pages 17-18 of the petition), has taken the position that, under the undisputed facts of record, the only permit which the Arkansas Public Service Commission could grant would be for the performance of intrastate transportation, whereas the only transportation involved in this proceeding is interstate.

remembered that the transportation here involved is private carriage within the meaning of the Interstate Commerce Act, and that the Arkansas Motor Carrier Act specifically provides that it shall not apply to private carriage. To refer to the cited cases in **Columbia Terminals Company v. Lambert et al.**, 309 U. S. 620, 84 L. Ed. 983, plaintiff admittedly was a contract carrier; **South Carolina State Highway Department v. Barnwell Brothers, Inc., et al.**, 303 U. S. 177, 82 L. Ed. 734, establishes simply the right of states to enact height and weight limitations for vehicles engaged in using the highways of the state where no such limitations had been prescribed by Congress; and in **Frank Eicholz v. Public Service Commission of the State of Missouri**, 306 U. S. 268, 83 L. Ed. 641, the court simply held that the state had a right to revoke an interstate common carrier certificate granted by it to the carrier by virtue of the fact that the carrier had violated an intrastate permit, the carrier having applied for but not yet obtained an interstate common carrier certificate of convenience and necessity. Thus it is plain that neither of these decisions have any application to the principles involved in the case at bar.

Such position is predicated upon the Rules and Regulations of the Arkansas Public Service Commission promulgated pursuant to the authority vested in it by Act 367 of the Acts of Arkansas of 1941. Pertinent portions of such rules and regulations are attached hereto as Appendix "A." It is to be noted that as a prerequisite to the granting of an interstate permit the carrier must file a copy of the operating authority granted by the Interstate Commerce Commission. Petitioner's truck drivers have no contract carrier authority from the Interstate Commerce Commission inasmuch, under rulings of such Commission, petitioner is a private carrier and its drivers are its bona fide employees. Further, other prerequisites of the Arkansas Public Service Commission for the obtaining of an Interstate Contract Carrier's Permit cannot be met by petitioner's drivers, inasmuch as there is no contract between petitioner and its drivers for the transportation of any specific commodity over any given route or routes, nor between any specified points. Petitioner's drivers simply transport petitioner's products, in quantities designated by petitioner, over any route designated by petitioner, and, to any point designated by petitioner. Neither can petitioner's drivers satisfy the prerequisite of the Arkansas Public Service Commission that a description of the equipment to be used be furnished inasmuch as petitioner alone designates the equipment to be used, and the financial status of its drivers is immaterial to petitioner inasmuch as it assumes complete responsibility for the safety of the cargo and operation of the leased motor vehicle equipment.

The Congress has invested the Interstate Commerce Commission with jurisdiction to regulate private motor carrier transportation in interstate commerce and has defined such transportation, Title 49, U. S. Code, Sections 303 (a) (17) and 304 (a) (3), and petitioner is established of record to have complied with all rules and regulations of the Interstate Commerce Commission with respect to private carriage (R. 63-66, 110). The Congress has preempted, as well, the field of interstate contract carriage, Title 49, U. S. Code, Sections 303 (a) (15) and 304 (a) (2), and the Interstate Commerce Commission has, as petitioner pointed out, supra, defined the elements essential to the existence of contract carriage.

There is, therefore, among others set forth in the petition for a writ of certiorari, the substantial question as to the extent to which states, in interpretation of local statutes, may be permitted to set up standards with respect to interstate commerce for determining whether private or contract carriage is being performed contrary to and at variance with the Interstate Commerce Act and its interpretation by the Interstate Commerce Commission and the Courts.

For the reasons above, as well as for the additional reasons assigned in the petition for a writ of certiorari, it is respectfully presented that the petition should be granted and that this Court should determine the substantial federal questions involved.

Respectfully submitted,

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APPENDIX "A."

Pertinent excerpts from "Rules and Regulations Governing Motor Carriers" promulgated by the Arkansas Corporation Commission, whose functions and duties and enforcement of such rules and regulations were assumed by the Arkansas Public Service Commission pursuant to Act 40 of the Acts of Arkansas of 1945, are as follows:

Instructions for Filing Applications.

"1. Formal application must be filed with the Arkansas Corporation Commission upon forms furnished by the Commission. Said application must contain the petitioner's name, place of business and post office address; a detail description of the route over which the applicant desires to operate, a description of the equipment to be used, a full and complete financial statement, giving assets and liabilities, accompanied by a map showing the routes of the proposed operation.

"(a) If the proposed operation is freight service, the application must state the commodities to be transported, whether special or general, and whether the carrier is common or contract.

"(b) If applicant is a contract carrier an executed copy of the contract must accompany the application. All contracts must be approved by the Commission."

Interstate.

"5. For an Interstate permit you must also file application, accompanied by a \$25.00 filing fee. Also send a copy of your authority granted by the Interstate Commerce Commission. It will not be necessary for you to appear in person as the Commission does not require a formal hearing on interstate application, but you must file your public liability, property damage, and cargo insurance with the Arkansas Endorsement attached, countersigned by an Arkansas Agent."